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Enforcement Methods Used in Applying the California Smoke- Free Workplace Act to Bars and Taverns

By Damon K. Nagami✉

I. Introduction

Heightened awareness of the health hazards associated with environmental tobacco smoke ("ETS"), along with political pressure from antismoking forces, have prompted many states to pass some form of clean indoor air legislation.¹ These laws either ban indoor smoking outright, or restrict smoking in workplaces and in indoor public places (such as restaurants, retail stores, shopping malls and hospitals) to designated smoking areas.² For example, California's statewide smoking ban, the result of a state initiative passed in 1994, outlawed smoking in most indoor workplaces. However, due to the tobacco industry's heavy influence on state legislatures, many states exempted certain types of public places from their clean indoor air laws. California was not immune to such legislative deal-making and pro-tobacco legislators succeeded in securing key concessions. However, despite these concessions, the state's clean indoor air law is regarded by many observers as the strictest and most far-reaching in the nation due to its unprecedented prohibition of smoking in bars and taverns.³

California's imposition of a smoking ban on bars is supported by most Californians and lauded by many public health groups. However, for the law to work properly, state and local officials must implement effective

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1. See, e.g., LA. REV. STAT. ANN. §§ 40:1300.21-.27 (2000); MO. ANN. STAT. §§ 191.765-.777 (1999); MONT. CODE ANN. §§ 50-40-101 to -109 (1999); OR. REV. STAT. §§ 433.835-.875 (1997); UTAH CODE ANN. §§ 26-38-1 to -9 (2000); VA. CODE ANN. §§ 15.2-2800 to -2810 (1999); VT. STAT. ANN. tit. 18, §§ 1421-1423 (1999).

2. See, e.g., sources cited *supra* note 1.

3. The California law states that the term "bar" or "tavern" refers to "a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental." CAL. LAB. CODE § 6404.5(d)(8). As the terms "bar" and "tavern" are functionally equivalent for purposes of the Act, only the general term "bar" will be used throughout this article.

enforcement methods to ensure the compliance of bar patrons and bar owners. This note will examine California's application of its statewide workplace smoking ban to bars, concentrating on enforcement measures that have been taken in the first two years. The article will begin with a brief overview of the vigorous debate over workplace smoking bans, and the antismoking movement that led to California's passage of its groundbreaking law. After reviewing the law's general provisions and the bar exemption, the article will summarize the results of public opinion surveys and studies of the economic effect of the ban that have been gathered in the past two years. It will then describe and evaluate the various enforcement programs that have been developed by state and local enforcement officials. The note will conclude with recommendations on how municipalities and enforcement agencies can ensure a high level of compliance with the law.

II. Background

A. The movement to ban smoking

People have debated the health effects of smoking ever since Spanish explorers introduced tobacco to Europeans in the sixteenth century.⁴ However, several developments in the last half-century have negatively influenced Americans' attitudes towards smoking in public. Most notably, scientific reports released by well-respected governmental agencies have raised troubling questions about how tobacco use affects human health. In 1964, a high-profile report from the Surgeon General warned

Americans of the health hazards associated with smoking.⁵ In 1972, the Surgeon General further warned nonsmokers in particular that exposure to ETS posed health risks, and he recommended that greater controls on the use of tobacco be implemented.⁶ In response to these recommendations and warnings, during the late 1970s and early 1980s, legislators in a few ambitiously progressive states began trying to pass clean indoor air legislation.⁷

In the late 1980s and throughout the 1990s, with the release of several comprehensive studies, the movement to restrict smoking in public places progressed dramatically. In 1986, the Surgeon General⁸ and the National Research Council⁹ both identified ETS as a cause of lung cancer in healthy nonsmokers; and, in 1992, the United States Environmental Protection Agency ("EPA") designated ETS as a group A, or known human, carcinogen.¹⁰ In 1997, the California Environmental Protection Agency found ETS to be causally associated with developmental health effects such as sudden infant death syndrome, respiratory health effects such as childhood asthma, and cardiovascular health effects such as heart disease mortality.¹¹

Smokers' rights groups criticized these reports, accusing the agencies and academics of using faulty scientific methods and greatly exaggerating the results. Critics cited the Congressional Research Service's finding that the EPA's classification of ETS as a group A carcinogen was not warranted by the evidence.¹² Critics also accused the EPA report of using a misleading analogy to distort the facts.

4. See GILDA BERGER, *SMOKING NOT ALLOWED* 11 (Franklin Watts 1987).

5. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964).

6. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL* (1964).

7. See James R. Davis & Ross C. Brownson, *A Policy for Clean Indoor Air in Missouri: History and Lessons Learned*, 13 ST. LOUIS U. PUB. L. REV. 749, 750 (1994).

8. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Preface to THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* at ix-xii (1986).

9. COMM. ON PASSIVE SMOKING, NAT'L RESEARCH COUNCIL,

ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS 10 (1986).

10. ENVTL. PROT. AGENCY, *RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS* (1992).

11. REPRODUCTIVE & CANCER HAZARD ASSESSMENT SECTION (RCHAS) & AIR TOXICOLOGY & EPIDEMIOLOGY SECTION (ATES), CAL. ENVTL. PROT. AGENCY, *HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE* (1997).

12. See Rosalind B. Marimont, *Casualties of the War on Smoking*, in *TOBACCO AND SMOKING: OPPOSING VIEWPOINTS* 26 (Mary E. Williams ed., 1998). The critics were further validated in July 1998, when a United States district court overturned the EPA's conclusion that ETS is a Class A carcinogen. *Flue-Cured Tobacco Co-op. Stabilization Corp. v. United States Env't. Prot. Agency*, 4 F. Supp. 2d 435, 466 (M.D.N.C. 1998).

According to them, the report argued that since smoking could harm you, breathing in someone else's exhaled smoke could also harm you. Critics argued that whereas a smoker habitually inhaled hot, concentrated tobacco smoke, an innocent bystander took in air which contained only minute quantities of residual chemicals from the tobacco and thus suffered only minimal harm.¹³ Finally, because federal money funded these studies, critics accused health scientists of manipulating evidence to achieve the politically desired outcome.¹⁴

Despite these criticisms, in the past decade government and private business policies restricting or outlawing smoking in public places have become increasingly common.¹⁵ Perhaps this trend stems from the American public's faith in the reliability of the studies. In any case, although smokers' rights groups have challenged nonsmoking regulations on a variety of grounds, they have had very little success.¹⁶ By 1999, nearly all of the states and the District of Columbia had restricted smoking in public places in some manner.¹⁷

B. California and Assembly Bill 13

Reacting to and prompted by the nationwide antismoking movement, the California legislature enacted the Indoor Clean Air Act of 1976.¹⁸ Finding tobacco smoke to be a public health hazard,¹⁹ the legislature restricted smoking in publicly owned buildings,²⁰ health facilities,²¹ retail food production and marketing establishments,²² and on private and public

transportation.²³ The law provided that any person could apply for a writ of mandate to compel compliance by a public entity in violation of the law,²⁴ and it imposed, as punishment for smoking on private or public transportation, fines ranging from \$100 for the first violation to \$500 for the third and subsequent violations within one year.²⁵ The law also included a provision clarifying the legislature's intent not to preempt the field of smoking regulation, and it specified that local governments could ban or restrict smoking in any manner which would not be inconsistent with the state law.²⁶

Just a few years after this law was enacted, however, Californians began to show a strong desire for an even tougher statewide antismoking law. In California, laws can be made through the initiative process, whereby proposed laws can be placed on the ballot if they receive enough signatures of support from state citizens.²⁷ In November 1978, California residents voted on Proposition 5, which would have restricted smoking in most enclosed public places, including stores, restaurants, and workplaces.²⁸ Although polls showed the proposed law ahead by as much as twenty percent with only two months to go before the election,²⁹ tobacco companies poured over \$5 million into a slick television and radio ad campaign opposing the law.³⁰ Thus, despite the citizens' earlier initiative, California voters narrowly rejected Proposition 5.³¹

During the 1980s, although Californians were unable to enact strong, uniform statewide

13. See Jacob Sullum, *Just How Bad Is Secondhand Smoke?*, in *TOBACCO AND SMOKING: OPPOSING VIEWPOINTS*, *supra* note 12, at 50.

14. See *id.* at 27.

15. Davis & Brownson, *supra* note 7, at 752.

16. Alan Stephens, Annotation, *Validity, Construction, and Application of Nonsmoking Regulations*, 65 A.L.R. 4th 1205 (1999). Nonsmoking regulations have withstood federal constitutional challenges based on equal protection, due process, fundamental rights and contract clause grounds. *Id.*

17. Am. Heart Ass'n, *Clean Indoor Air Laws*, at http://www.americanheart.org/Heart_and_Stroke_A_Z_Guide/clean.html (visited Jan. 15, 2000).

18. CAL. HEALTH & SAFETY CODE §§ 118875-118920 (Deering 1999).

19. § 118880.

20. § 118885.

21. § 118890.

22. § 118915.

23. §§ 118925-118945.

24. § 118905.

25. § 118945.

26. § 118910.

27. CAL. CONST. art. II, § 8.

28. *Why Tobacco Fears the California Voter*, BUSINESS WEEK, Sep. 11, 1978, at 54.

29. Melinda Beck, *The New Issues: No Smoking*, NEWSWEEK, Oct. 2, 1978, at 56.

30. *Id.*; see also Ward Sinclair, *Massive New U.S. Report Blasts Cigarette Smoking; Antismoking Drive Growing in America*, WASH. POST, Jan. 12, 1979, at A1.

31. Sinclair, *supra* note 30.

smoking restrictions, they did succeed in enacting strict local smoking bans or restrictions at the city and county levels.³² By the early 1990s, however, antismoking forces were clamoring for a stronger law, in the form of a complete overhaul of the 1976 Act. In December 1992, a Democratic legislator introduced Assembly Bill 13 (AB 13).³³ The push for the proposed comprehensive statewide clean indoor air law came from a broad coalition that included public health advocates, restaurant owners, and labor unions.³⁴ Health groups and workers' rights groups, bolstered by the recently released EPA and Surgeon General reports, lauded the proposed legislation's stated goal of protecting California workers from the hazardous health effects of ETS.³⁵ Private employers also supported AB 13 due to other advantages that would directly result from the bill. For example, AB 13 was projected to lead to a decrease in the number of ETS-based workers' compensation claims,³⁶ and it demonstrated potential to alleviate perceived economic disadvantages suffered by businesses that had previously complained of uneven local smoking restrictions and enforcement.³⁷

Opponents of AB 13 feared the economic backlash that would result from a statewide smoking ban and questioned the necessity of statewide preemption of local smoking ordinances and regulations.³⁸ These critics claimed that a statewide smoking ban would add to California's perceived negative business climate and would adversely affect the hospitality and tourism industries.³⁹ The critics, which

even included some nonsmokers' rights groups, also pointed out that without a statewide law, local governmental officials had been able to avoid the influence of tobacco lobbyists and had been better able to protect their constituents.⁴⁰ They claimed that statewide preemption would eliminate potential grass roots benefits, such as the insulation of local decision-makers, and the buildup of public commitment to, and compliance with, the law, which can be engendered through the cooperative efforts needed to pass local ordinances.⁴¹

AB 13 eventually passed, but not without fierce opposition from the tobacco industry and key concessions to certain interest groups. After tobacco lobbyists persuaded the Assembly to reject the bill on its initial pass, constituents barraged Assembly Members with letters and phone calls protesting their votes, which forced reconsideration of the bill.⁴² However, when the bill reached the Senate, several exceptions to the ban were added to the bill in order to curry the favor of fence-sitting Senators.⁴³ These included certain workplaces like truck cabs and large warehouses, hotel lobbies and banquet rooms, and a temporary three-year exemption for bars and card clubs.⁴⁴ Many observers predicted that the bill would not prevail due to tobacco's heavy influence over the legislature;⁴⁵ however, the extreme political pressure from constituents, as well as the inclusion of the exemptions, helped carry the bill successfully through both houses.

32. E.g., BEVERLY HILLS, CAL., MUN. CODE tit. 5, ch. 4 (1999) (effective Apr. 3, 1987); DEL MAR, CAL., MUN. CODE tit. 11, ch. 11.08 (1999); LOS ANGELES, CAL., MUN. CODE ch. IV, art. 1, § 41.50 (1999). See also Roxane Arnold, *Judge Rejects Challenge to Beverly Hills Smoking Ban*, L.A. TIMES, Apr. 3, 1987, Metro section, part 2, at 1; *California Town May Vote to Ban Smoking Outdoors*, TORONTO STAR, Oct. 29, 1987, at A3; Jeffrey L. Rabin, *Smoking Ban in Torrance is Adopted Unanimously*, L.A. TIMES, Nov. 19, 1987, Metro section, part 2, at 10.

33. A.B. 13, 1994 Reg. Sess. (Cal. 1994).

34. *Hearing on A.B. 13 Before the Cal. Assembly Comm. on Labor and Employment*, 1993 Reg. Sess. (Cal. 1993).

35. *Id.*

36. *Id.* at 2.

37. *Id.*

38. *Hearing Before the Cal. State Senate Comm. on Health and Human Services*, 1993 Reg. Sess. (Cal. 1993).

39. See *id.*; see also National Smokers Alliance Denounces Governor Wilson's Signing of Statewide Smoking Ban, PR Newswire, July 21, 1994.

40. *Hearing Before the Cal. State Senate Comm. on Health and Human Services*, *supra* note 38, at 2.

41. See *id.*

42. Rick Kushman, *Assembly Votes to Ban Smoking on the Job*, PRESS-ENTERPRISE (Riverside, Cal.), June 8, 1993, at A3. The Assembly eventually voted 43-24 to pass the measure. *Id.*

43. Dan Morain & Mark Gladstone, *Senate OKs Statewide Indoor Workplace Smoking Ban*, L.A. TIMES, July 1, 1994, at A29.

44. *Id.*

45. See, e.g., Dan Walters, *Where There's Smoking, There's Fire*, S.F. EXAMINER, June 30, 1994, at A19; Kushman, *supra* note 42; Morain & Gladstone, *supra* note 43.

In July 1994, Assembly Bill 13 was enacted into law as the California Smoke-Free Workplace Act.⁴⁶ In an attempt to stop the law from taking effect, tobacco companies financed Proposition 188, a ballot measure which would have invalidated the Act's provisions and replaced them with a weaker standard by which businesses and employers would have more power to regulate indoor smoking.⁴⁷ However, voters soundly defeated the initiative by a large margin.⁴⁸ As of January 2000, the California law remains the only statewide indoor smoking ban in the nation.⁴⁹

C. The California Smoke-Free Workplace Act

AB 13 prohibits smoking in all enclosed places of employment in the state with some exceptions.⁵⁰ The first part of the Act sets out its general requirements. The Act forbids patrons from smoking in an enclosed space at a workplace, and it also forbids employers from knowingly or intentionally permitting any person to smoke in an enclosed space at a workplace.⁵¹ With respect to regular customers, an employer is not deemed to have acted knowingly or intentionally if he or she has taken reasonable steps to prevent smoking in the work-

place.⁵² Such reasonable steps include posting prominent "no smoking" signs or, if allowed, posting signs clearly designating permitted smoking areas,⁵³ and requesting that a patron refrain from smoking while in the enclosed workplace.⁵⁴

The second part of the Act lists workplaces that are exempt from the requirements of the Act.⁵⁵ Workplaces not subject to the Act's provisions include hotels and motels,⁵⁶ private smokers' lounges,⁵⁷ retail or wholesale tobacco shops,⁵⁸ cabs of motortrucks,⁵⁹ warehouse facilities,⁶⁰ theatrical production sites,⁶¹ medical research or treatment sites,⁶² private homes,⁶³ patient smoking areas in long-term health care facilities,⁶⁴ properly outfitted breakrooms,⁶⁵ and workplaces with five or fewer employees.⁶⁶ As enacted in 1994, the Act exempted gaming clubs and bars;⁶⁷ however, this exemption was to remain in effect only until the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency adopted an ETS standard that would prevent significantly harmful health effects.⁶⁸ The exemption would expire on January 1, 1997, if neither agency had adopted an appropriate standard by that date.⁶⁹ The legislature later amended the Act to extend that date to January 1, 1998.⁷⁰

The final part of the Act covers preemption

46. 1994 Cal. Stat. 310 § 1 (codified as amended at CAL. LAB. CODE § 6404.5 (Deering 1999)).

47. Susan Steinberg, *Local Smoking Ban Delayed Pending Prop. 188*, L.A. TIMES, Oct. 28, 1994, at B1; see also Anne Dudley, *Proposition 188 Snuffs Out Restaurant Smoking Ban*, FRESNO BEE, Oct. 25, 1994, at B1.

48. Dan Morain & Virginia Ellis, *California Elections/Propositions*, L.A. TIMES, Nov. 9, 1994, at A3.

49. Greg Hernandez, *Many Bars Fail To Keep Patrons From Lighting Up, Survey Finds*, L.A. TIMES, Jan. 20, 2000, at C1.

50. CAL. LAB. CODE § 6404.5 (Deering 1999).

51. § 6404.5(b).

52. § 6404.5(c). "Reasonable steps" to prevent smoking do not include either the physical expulsion of a patron from the place of employment or requests to refrain from smoking which might involve a risk of physical harm to the employer or any employee. *Id.*

53. § 6404.5(c)(1)(A)-(B). Signs stating either "no smoking" or "smoking is prohibited except in designated areas" must be posted at each entrance to the building. *Id.*

54. § 6404.5(c)(2).

55. § 6404.5(d).

56. § 6404.5(d)(1)-(3). Hotels and motels obtained sever-

al exemptions, including sixty-five percent of guest room accommodations, areas of the lobby designated for smoking, and meeting and banquet rooms. *Id.*

57. § 6404.5(d)(4)(A).

58. § 6404.5(d)(4)(B).

59. § 6404.5(d)(5).

60. § 6404.5(d)(6). A "warehouse facility" is a facility with more than 100,000 square feet of floor space but only 20 or fewer full-time employees. *Id.* Office space within a warehouse facility is not exempted. *Id.*

61. § 6404.5(d)(9). Theatrical production sites are only exempted if smoking is "an integral part of the story in the theatrical production." *Id.*

62. § 6404.5(d)(10).

63. § 6404.5(d)(11).

64. § 6404.5(d)(12).

65. § 6404.5(d)(13).

66. § 6404.5(d)(14).

67. § 6404.5(d)(7)-(8).

68. § 6404.5(f)(1).

69. *Id.*

70. 1996 Cal. Stat. 989 § 1.

and enforcement issues. The Act states that, as a uniform statewide standard, it supersedes any local ordinances regulating workplace smoking.⁷¹ However, such preemption is only in effect as long as the Act provides for the complete prohibition of enclosed workplace smoking. If subsequent legislative or judicial action were to render the Act less than fully effective, local governments would automatically obtain the right to enact and enforce new, non-preempted prohibitive smoking ordinances.⁷² Preemption is to apply only to local governments and not to private employers, who can prohibit smoking in the workplace for any reason at any time.⁷³ Violations of the Act are classified as infractions, and bar owners and patrons who violate the Act can be punished as follows: "Any violation of [§ 6404.5(b)] is an infraction, punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each subsequent violation within one year."⁷⁴ After the third violation, the California Occupational Safety and Health Administration (Cal-OSHA) is authorized to visit the premises for a thorough workplace-safety inspection and may fine the operator up to \$7,000.⁷⁵ Enforcement is to be carried out by local law enforcement agencies, which includes local health departments.⁷⁶

71. CAL. LAB. CODE § 6404.5(g) (Deering 1999).

72. § 6404.5(i).

73. § 6404.5(h).

74. § 6404.5(j).

75. § 6404.5(k); see also, e.g., *L.A. Bar, Restaurant Owners Must Enforce Smoking Ban or Face Fines*, NATION'S RESTAURANT NEWS, July 26, 1999, at 36.

76. *Id.*

77. See, e.g., Patt Morrison, *Restaurants Call for Smoking Ban in Public Places*, L.A. TIMES, July 4, 1990, at A1 (reporting that the California Restaurant Association supported a statewide smoking ban over piecemeal regional legislation as early as 1990); Ken Ellingwood, *Cities Moving Cautiously on Smoking Bans*, L.A. TIMES, July 8, 1993, Westside section, part I, at 1 (reporting that West Hollywood restaurant owners were worried the proposed local smoking ban would "shoo" smoking diners to neighboring cities); *Dine-out Smoking Ban Within Reach*, L.A. TIMES, Sep. 15, 1991, at B10 (reporting that Laguna Beach restaurateurs would not object to a

III. The Smoking Ban as Applied to Bars — Public Opinion and Economic Effects

The most controversial part of California's statewide smoking ban has been the legislature's unprecedented application of the ban to bars. Curiously, it was probably the efforts of the hospitality industry, i.e., hotels, restaurants, and bars — the very places of business that would be covered by the smoking ban — that pushed the bill through the legislature. Before AB 13, hotels and restaurants had perceived that complying with local smoking ordinances would result in losing business to establishments that routinely ignored local non-smoking laws.⁷⁷ In response, hotel and restaurant owners' associations joined the effort to pass AB 13 in order to obtain a statewide law that would apply to all indoor workplaces.⁷⁸ As such, the ban would then preempt local ordinances and halt the inconsistent local enforcement of those ordinances.⁷⁹ Although California bar owners did not have a centralized lobbying group to demonstrate a unified endorsement of AB 13, some bar owners, in compliance with local non-smoking ordinances, supported the bill because they too were losing business to noncompliant bars.⁸⁰

With the hospitality industry's support, the ban on smoking in bars remained part of AB 13 and took effect on January 1, 1998, when the legislature decided not to extend the bar exemption. However, while it seemed fairly

local smoking ban if neighboring communities were subject to the same ban); Emily Adams, *Clientele May Decide if Eateries Will Survive Smoking Ban*, L.A. TIMES, Aug. 1, 1993, Long Beach section, at J1; Edmund Newton, *Council Weighs Restaurant Smoking Ban*, L.A. TIMES, Jan. 30, 1992, San Gabriel Valley section, at J1.

78. See, e.g., H.G. Reza, *Broad Ban on Smoking Considered*, L.A. TIMES, July 16, 1992, San Diego County ed., at B1 (reporting the San Diego Restaurant Association's preference for a statewide smoking ban over city or county ordinances).

79. See *Hearing Before the Cal. State Senate Judiciary Comm.*, 1994 Reg. Sess. (Cal. 1994). The California Restaurant Association supported AB 13 because it would "establish uniform state standards so that they don't have to worry about local variation[.]" *Id.*

80. See, e.g., Ken Hallinan, *City Ready to Crack Down on Smoking Ordinance Violators*, Copley News Service, July 7, 1999 (reporting that a San Pedro bar had lost 25 percent of its business while nearby noncompliant bars had not experienced a drop-off in business).

clear that the smoking ban as applied to restaurants was generally being accepted in California, public support for the ban as applied to bars was far from overwhelming. For example, smokers' rights groups criticized the California Department of Health Services for withholding from the public the results of a Field Poll showing that most bar owners and employees did not support the ban.⁸¹ It was not totally clear whether the general public would support a complete ban of smoking in bars.

Before the rise of the antismoking movement, it could be said that Americans generally thought of the local pub as a dim, smoky place. Movies and television typically portrayed smoking as a trendy and glamorous pastime. Even today, many people regard the local pub as a place where one might relax and have a cigarette after work.⁸² Health issues may have played a major role in the adoption of the restaurant ban, but anecdotal evidence suggests people seem fiercely protective of their right to smoke in their neighborhood bar.⁸³ Many bar owners and bar-goers appear to believe that if the smoke bothers a customer, then maybe he or she does not belong there.⁸⁴

How would Californians react to a ban on smoking in bars? How would the ban impact the state economically? After the ban went into effect, various government agencies and private organizations conducted several studies and polls to answer these questions.

A. Public opinion

Four surveys conducted in the first year after the ban took effect showed overall public support of the smoking ban as applied to bars. On a statewide level, two surveys from early 1998 found wide approval of the ban. The California Department of Health Services found in a February 1998 Field Poll that 85% of bar patrons would go to bars just as often, and that 59% of state residents supported the ban.⁸⁵ A spring 1998 survey conducted by the American Cancer Society found wide support of the ban among registered voters.⁸⁶ In southern California, two surveys conducted by the Los Angeles County Department of Health Services showed that most county residents supported the ban. Survey Methods Group polled county residents in February 1998 and found that 61% "either strongly or somewhat strongly" supported the smoking ban, and that 85% of county residents were "as likely or more likely" to visit smoke-free bars.⁸⁷ Later that spring, a county-commissioned Field Poll showed that 66% of county residents thought it was "very important" or "somewhat important" to have smoke-free bars and night clubs.⁸⁸

Pro-smoking groups questioned the credibility of these surveys and pointed to less well-known findings. The National Smokers Alliance, a smokers' rights group that opposes the ban, called the Los Angeles county survey "fatally flawed" because it only included people who had been in a bar since the ban began, thus excluding people who refused to go to a

81. See Gayle M.B. Hanson, *That's Not Fog in San Francisco*, INSIGHT ON THE NEWS, Feb. 1, 1999, at 32. The consultant firm Fabrizio, McLaughlin & Associates' analysis of the survey showed almost 70% of bar employees disapproving of the law. *Id.*

82. See, e.g., Karen McAllister, *Fresno Bar Smoking Not "Priority,"* FRESNO BEE, Nov. 30, 1998, Telegraph section, at A1 (quoting Fresno bar owner Joyce Snyder, on how drinking and smoking "go together": "It's like having a cup of coffee and reading the newspaper, or pie and ice cream").

83. See, e.g., Anne Burke, *Smokers' Last Call; Revelers Irritated at Dawn of Cigarette Ban in Bars*, DAILY NEWS OF LOS ANGELES, Jan. 1, 1998, at N1; Lance Williams and Marianne Costantinou, *Smoking in Bars Will Be \$76 Drag*, S.F. EXAMINER, Jan. 15, 1999, at A1. Some excerpts from smokers annoyed by the ban: "I don't like it-that's for sure. I like a beer with my cigarette and a cigarette with my beer," Burke, *supra*. "Smoking and drinking go hand in hand. It's kind of inconvenient to walk all the way outside and smoke a cigarette." *Id.* "People are going to smoke in bars, no matter what," Williams, *supra*. "If people don't want to smoke, keep them at home. Smoking has been in bars forever," *Id.*

84. Williams, *supra* note 83.

85. CALIFORNIA DEP'T OF HEALTH SERVS., PUB. NO. 68-98, BAR PATRONS IN CALIFORNIA SUPPORT SMOKE-FREE BARS (1998). According to the survey, 26% of bar patrons reported that they are smokers. *Id.* See also James P. Sweeney, *Patrons Support Ban on Smoking; Poll Finds Most Prefer Bars To Be Smoke-Free*, SAN DIEGO UNION-TRIB., June 24, 1998, at A3.

86. Rick Orlov, *Smoking Ban Hurts Bars, Says Survey*, DAILY NEWS OF LOS ANGELES, May 1, 1998, at N4 (reporting that the American Cancer Society's survey found 61% of registered California voters supporting the ban).

87. Lee Condon & Deborah Sullivan, *Patrons: Smoking Ban OK; County Poll Finds Few Foes*, DAILY NEWS OF LOS ANGELES, Mar. 5, 1998, at N1.

88. L.A. County Dep't of Health Servs., *Most County Adults Support Tobacco Control Laws*, Feb. 1999. The poll also showed that 71% of non-smokers and 48% of smokers thought it was important to have smoke-free bars and night clubs. *Id.*

bar because of the ban.⁸⁹ The Alliance further noted that the American Cancer Society survey found that more than one third of Californians opposed the smoking ban, which was almost twice the reported number of smokers in the state.⁹⁰ Nevertheless, the cumulative findings of the surveys, the lack of support behind efforts to repeal the ban,⁹¹ and the fact that nonsmokers constitute 82% of all Californians⁹² all tend to support the conclusion that Californians generally approve of the ban.

B. Studies on economic effects

Various studies on the economic effects of the ban on smoking in bars have led, so far, to inconclusive data and conflicting results. On one side, reports have provided some evidence that the ban has not harmed business for bars. At the most general level, a study published in the *Journal of the American Medical Association* in May 1999 found that smoking bans do not appear to adversely affect, and may in fact increase, tourist business.⁹³ This report measured only revenue and tourism rates of hotels and restaurants, so the study has limited value in extrapolating the results to bars. However, according to a state Board of Equalization report released in June 1998 sales data from California's smallest bars in the first month after the ban took effect indicated sales did not decrease as critics predicted, but rather increased 1.06% over the previous month.⁹⁴ Furthermore, the Board's 1998 year-end report, released in November 1999, showed a 5.6% overall increase in retail sales for all California bars.⁹⁵

A survey of bar owners, however, showed that the ban did adversely affect their business. The American Beverage Institute, an associa-

tion of restaurant operators that serve alcohol, commissioned a study in July 1998 to determine the effects of the ban on bars and nightclubs in the ban's first six months.⁹⁶ The study, conducted by the KPMG accounting firm, found that over 59% of the establishments surveyed had lost business since the ban went into effect.⁹⁷ Stand-alone bars (bars not connected to restaurants) were hit the hardest, with 81.3% experiencing a decrease in business.⁹⁸ The survey further found respondents reporting an increase in customer complaints and fights, a loss of regular customers, and a loss of tips for the bar and serving staff.⁹⁹

Antismoking groups criticized the KPMG report, while bar owners, in turn, blasted the health groups' misrepresentation of bar sales data. The American Cancer Society dismissed the KPMG survey as "anecdotal information" and pointed to the tax figures as an illustration of the real impact on bar sales.¹⁰⁰ Some bar owners, however, called the bar sales figures "deceiving" because many bars and local enforcement officials had not been enforcing the ban.¹⁰¹ Such conflicting information has left observers with the work of piecing together an overall picture of the ban's economic effect. Most agree that while bar sales increased as a whole in 1998, it is generally attributed to the upswing in the economic health of California's tourism industry. On the other hand, the double-digit percentage decrease in bar sales foreseen by critics of the ban never materialized. It is clear that further surveys and analyses of bar sales data will be necessary to measure the economic effects of the ban on California's bars adequately.

89. See Condon & Sullivan, *supra* note 87.

90. Poll: *California Supports Smoking Ban*, UPI, Mar. 25, 1998.

91. See *infra* note 105 and accompanying text.

92. Shante Morgan, *Poll Indicates People Happy With Smoking Ban*, Copley News Service, Mar. 5, 1998.

93. Stanton A. Glantz & Annemarie Charlesworth, *Tourism and Hotel Revenues Before and After Passage of Smoke-Free Restaurant Ordinances*, 281 JAMA 1911-1918 (1999).

94. James P. Sweeney, *Bars Not Put Out By Smoke Ban, Tax Data Show*, SAN DIEGO UNION-TRIB., June 25, 1998, at A3.

95. James P. Sweeney, *Smoking Ban Good For Bars, A Report*

Says, SAN DIEGO UNION-TRIB., Nov. 6, 1999, at A3.

96. AMERICAN BEVERAGE INST., *EFFECTS OF 1998 CALIFORNIA SMOKING BAN ON BARS, TAVERNS AND NIGHT CLUBS* (1998).

97. *Id.*

98. *Id.*

99. *Id.* Half of the respondents reported an increase in customer complaints and fights, 65% indicated losing regular customers, and 59% reported losing tips for the serving staff. *Id.*

100. Orlov, *supra* note 86.

101. Sweeney, *supra* note 95.

IV. Enforcement Efforts

The main reasons cited for the "deceiving" sales figures of bars were that bars were not complying with the ban, and that law enforcement officials were not enforcing it. An American Lung Association study showed a compliance rate of over 90% in bars attached to restaurants, but a rate of only 40% in stand-alone bars.¹⁰²

Local and state enforcement efforts have been inconsistent, yielding widely varying results. On one end of the spectrum, cities with organized and dedicated enforcement efforts have produced commendable compliance rates. For example, early and aggressive enforcement by a special city enforcement unit undoubtedly helped the seaside town of San Clemente in southern Orange County achieve almost 100% compliance with the ban.¹⁰³ On the other end, delayed enforcement efforts and less aggressive enforcement methods in the ban's first year may have contributed to the mediocre 50% compliance rate of Los Angeles County's stand-alone bars.¹⁰⁴

Despite reports of noncompliant bars and lax enforcement, overturning the ban would probably be difficult to achieve. Three months after the ban went into effect, the California legislature flatly rejected a bill that would have repealed the ban.¹⁰⁵ Antismoking groups picked up even more support by publicizing the results of scientific studies that showed ETS in bars to be detrimental to the health of waitresses and bartenders.¹⁰⁶ Since it appears the ban will remain part of California law for the time being, Californians should turn their thoughts toward improving local enforcement efforts.¹⁰⁷

A. Problems facing enforcement efforts

One observer noted that perhaps achieving full compliance will only require time, "much like the seat belt law did."¹⁰⁸ However, in the first two years after the ban took effect, the agencies charged with enforcing the ban encountered several problems. County health departments and local law enforcement officials, which deal with day-to-day enforcement issues, and the California Department of Health Services, the state agency ultimately responsible for enforcing the ban, needed to overcome several hurdles before they could even begin to achieve greater compliance with the ban.

1. Lack of adequate funding. Some cities, counties and local health departments attributed their weak enforcement efforts to inadequate funding. Large cities and counties faced the huge administrative challenge of providing enforcement services for literally thousands of bars. For example, in Los Angeles, an eight-person team of investigators from the city fire department, who usually inspect buildings for fire code violations, were responsible for handling all of the smoking complaints from patrons frequenting the city's innumerable bars.¹⁰⁹

2. Ineffective and illogical administrative structure. In some cities and counties, the enforcement scheme was somehow logically deficient in design. For instance, in Los Angeles County, for the first year and a half of the ban, county health department officials were charged with investigating smoking complaints. The investigators would work a day

102. Hernandez, *supra* note 49.

103. *Id.*

104. *Id.*

105. A.B. 297, 1998 Reg. Sess. (Cal. 1998); see also Jon Matthews, *Bill to Repeal Smoking Ban Gets Snuffed Out*, FRESNO BEE, Mar. 26, 1998, at A3.

106. MICHAEL SIEGEL, CTRS. FOR DISEASE CONTROL, SMOKING AND RESTAURANTS: A GUIDE FOR POLICY-MAKERS (1992) (finding that waitresses have the highest mortality rate of any female occupational group); Mark D. Eisner et al., *Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, 280 JAMA 1909-1914 (1998) (finding that the establishment of smoke-free bars

was associated with a rapid improvement of respiratory health). See also Thomas H. Maugh II, *Smoking Ban Boosted Health of Bartenders*, Study Reports, L.A. TIMES, Dec. 9, 1998, at A1; Paul O'Donoghue, *Smoking Ban*, City News Service, June 10, 1998.

107. Evaluating potential tobacco control measures that might be pursued in the absence of a bar ban (for instance, if the ban is repealed in the near future) is outside the scope of this article.

108. Hernandez, *supra* note 49 (quoting Dian Kiser, director of the Orange County Tobacco Use Prevention Program).

109. Rick Orlov & David R. Baker, *Smoking Ban Not Enforced*, City Says, DAILY NEWS OF LOS ANGELES, Sep. 15, 1998, at N4.

shift but would clock out at 5:00 p.m., before most of the bars reached their peak hours.¹¹⁰ Reports surfaced that many bars were only complying with the ban during the day, and would stop enforcing it at night.¹¹¹

3. Low prioritization by law enforcement.

In jurisdictions where local law enforcement bodies were charged with enforcing the ban, police officers and city officials would often give the task a low priority. Police departments saw the primary function of law enforcement officers to be ensuring the public's safety, and justifiably so. However, many officials also thought that spending any of their limited resources on enforcing the ban would be a waste of time and money.¹¹² Factoring into this mode of thinking was the widespread notion among the general public that vigorous police enforcement of the ban might not be the best use of taxpayer money or police manpower.¹¹³

B. Evaluation of past and current enforcement programs

Enforcement agencies took several different approaches in dealing with these problems. Some cities set up their enforcement programs early and started pursuing violators aggressively from the beginning. Others took a more educational approach, preferring to issue warnings rather than citations. Still others tried to use litigation to bring noncompliant bar owners and patrons into compliance. Enforcement agencies implementing each of the following enforcement methods encountered numerous problems; however, agencies appear to be taking their enforcement duties much more seriously now than they did when the ban first went into effect.

1. Aggressive policing. Cities and counties that instituted organized, well-funded and aggressive policing campaigns soon after the ban took effect achieved much higher compliance rates than those that delayed serious enforcement efforts, afforded fewer resources to enforcement officials, or lacked an adequate administrative structure to carry out effective enforcement. Those municipalities that got off to a late start or have only limited funds can increase their compliance rates by carefully choosing police-based enforcement methods that suit their needs while still meeting budgetary constraints. Increased police enforcement should lead to greater compliance with the ban; however, policing methods that are too aggressive may have a backlash effect, alienating the public and ultimately hindering enforcement efforts. Also, as with any law, enforcement officers must be wary of creative ways people have devised to get around the ban.

The city of San Diego's aggressive police-based enforcement program has been hailed by antismoking groups as a model that other cities should follow.¹¹⁴ Run by the police department's vice squad, the program led to the issuance of 134 citations to smokers in 1998.¹¹⁵ The fine attached to those citations ranged from \$100 for first-time offenders to as much as \$500 for repeat offenders.¹¹⁶ By contrast, San Francisco issued just five citations in 1998, none of which included a monetary fine.¹¹⁷

San Diego started its program relatively early — just three months after the ban took effect. In its first attempt to enforce the law, the city sent out police detectives from the vice squad to bars that had received complaints of smoking violations.¹¹⁸ Several smoking patrons

110. Alan Liddle, *Bar, Club Owners Fight California Smoking Ban*, NATION'S RESTAURANT NEWS, Apr. 13, 1998, at 3.

111. *Id.*

112. McAllister, *supra* note 82. Fresno city manager Jeff Reid remarked, "We've got a lot of other crime. It's more important we make sure the broader public safety issues are dealt with on a routine basis." *Id.*

113. *Id.*

114. Tony Perry, *Smoking Ban at San Diego Bars Has Patrons Fuming*, L.A. TIMES, Feb. 21, 1999, at A1.

115. Harrison Sheppard, *Warning Shots to Bar Smokers Draw Fire From Council*, DAILY NEWS OF L.A., July 27, 1999, at N1.

116. Joe Hughes, *City Vice Officers Crack Down on Barroom Smokers*, SAN DIEGO UNION-TRIB., Mar. 7, 1998, at B5; *see also* Perry, *supra* note 114.

117. Jonathan Curiel, *In S.F., Smoke Still Gets in Their Eyes*, S.F. CHRON., Nov. 30, 1998, at A1.

118. Hughes, *supra* note 116.

reportedly ran outside when they saw the detectives,¹¹⁹ suggesting that they knew they were violating the law by lighting up inside the bar. Vice officers issued a total of 28 citations that night to both bar owners and patrons.¹²⁰

Since then the department has added a new twist to the enforcement program — the use of undercover officers.¹²¹ Plainclothes detectives lounge on bar stools or meander through the sea of bar-goers, all the while keeping an eye out for smoking patrons. If an officer notices a barroom smoker lighting a cigarette, the detective "flashes a badge and politely, quietly, invites the smoker outside, where he or she receives a citation."¹²² One detective noted that the vice officers hardly ever let violators off with a warning, noting that this is a well-publicized law and that bar patrons have had ample notice.¹²³ According to a staff sergeant, the police department's objective in using undercover detectives is to create "paranoia" about being cited in order to achieve compliance.¹²⁴

Although the vice squad's "paranoia" approach has generated a lot of publicity and has garnered San Diego a well-earned reputation for being tough on barroom smoking, it is not clear that the city's ultra-aggressive approach actually works. No survey or study thus far has concluded that an aggressive approach such as San Diego's produces a higher rate of compliance than would an established, well-funded "soft" enforcement program consisting mainly of warnings and education and outreach programs. In fact, despite San Diego's efforts to deter barroom smoking through aggressive police enforcement, data from early 1999 showed that only 51% of the city's stand-alone bars were in compliance with the ban.¹²⁵

San Diego detectives also admit that their

aggressive enforcement methods have incited numerous angry confrontations between police officers and cited smokers.¹²⁶ The vice squad officers have been yelled at, insulted and even likened to World War II dictators, with some patrons actually using the word "Nazi."¹²⁷ Detectives say they get into more confrontations enforcing the ban than in any other work they do, and that they always work in teams because they worry that a smoking bust might get out of hand.¹²⁸ The reaction from cited patrons illustrates an important point: if citizens perceive an enforcement program as unreasonably aggressive, subsequent public disapproval might endanger the program itself. Municipalities choosing to enforce the ban primarily through policing must be wary of antagonizing bar patrons to the point where a public backlash against police efforts might work against the enforcement program.

In addition, the high fines imposed by the police and the tenacity with which the department has pursued violators have prompted several bar owners and operators to devise a clever way to get around the law. San Diego police suspect that bartenders have been using a "phone tree" warning system to alert nearby bars of patrolling vice officers.¹²⁹ Detectives have reported that on some nights, after finding violators at a few bars earlier in the evening, they would enter smoke-filled bars later that night to find not a single person smoking.¹³⁰ There is evidence that a similar phone tree scheme has been used by bartenders in San Francisco, where a senior health inspector cites the warning system as a major impediment to enforcement efforts.¹³¹ Police departments must crack down on schemes such as these to maximize the efficacy of their enforcement efforts.

119. *Id.*

120. *Id.*

121. Perry, *supra* note 114.

122. *Id.*

123. Sheppard, *supra* note 115.

124. Perry, *supra* note 114.

125. Am. Lung Ass'n of Cal., *Business is Booming in Smoke-Free Bars Despite Dire Predictions*, at <http://www.californialung.org/spotlight/smokefreebars.html> (visited Mar. 2, 2000).

126. Perry, *supra* note 114.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Mackenzie Warren, *Busting Smokers Riles Some Barkeeps; Taverns Use "Phone Tree" to Warn of Cops*, S.F. EXAMINER, Feb. 22, 1999, at A1.

Irrespective of their effectiveness, programs like San Diego's deserve much credit for placing enforcement of the ban high on their list of priorities. San Diego's no-nonsense approach stems from the realization that any law requires a serious and dedicated effort at enforcement in order to be effective. A San Diego vice detective summed up the city's philosophy: "The law is here to stay and so are we. As long as there is a law, we'll enforce it."¹³²

2. Citizen reporting. Agencies responsible for enforcing the ban should take advantage of strong public support for the ban by encouraging citizens to report violations. A citizen reporting scheme tied to an effective inspection and/or policing program can improve compliance rates and increase public involvement and awareness. Also, in order to achieve maximum compliance, agencies should make it as easy as possible for people to file their complaints.

The city of Los Angeles has taken the citizen reporting approach. The city council passed an ordinance requiring all establishments holding permits from the state Alcohol Beverage Control Department to post special "no smoking" signs with a toll-free number for reporting violations of the ban.¹³³ The L.A. city attorney's office receives the calls, and bars that get at least two complaints are referred to a full-time two-person inspection team from the city fire department.¹³⁴ If an inspector responding to a complaint finds a bar to be in violation of the ban, the bar owner is required to appear before the city attorney and must pay a minimum \$100 fine, plus an estimated \$170 in court costs.¹³⁵

The citizen reporting scheme came about at the urging of city council members frustrated with the city's lax approach towards enforcement.¹³⁶ Los Angeles did not have a formal enforcement program in place for the first year and a half of the ban's existence.¹³⁷ After receiving several complaints from the public that bars were violating the law,¹³⁸ the city council passed the citizen reporting ordinance in April 1999.¹³⁹ Two months later the city council authorized the fire department to create the two-person task force, approving a \$250,000 budget.¹⁴⁰ Even then, the mayor stated that he envisioned, at least at first, a more educational approach consisting primarily of warnings and the mere visibility of inspectors rather than fines.¹⁴¹ City council members insisted, however, that they had voted for an *enforcement* program and that, through both the council's passage of the ordinance and its approval of the task force budget, the city was effectively ordering the inspectors to go out and *enforce* the law.¹⁴²

Before the ordinance passed, the city attorney's office received approximately one hundred calls a month to complain of smoking in bars.¹⁴³ According to Councilwoman Laura Chick, the main proponent of the ordinance and a strong supporter of the ban, a toll-free number tied to a full-time inspection team will be much more effective than the voluntary compliance system the city relied on in the past.¹⁴⁴ An L.A. Fire Department captain claims the ordinance is already having an impact: he reported that in the first six months after the ordinance went into effect, inspectors brought five recalcitrant bar owners before the city attorney, who ordered the violators to pay substantial fines.¹⁴⁵

132. Perry, *supra* note 114.

133. LOS ANGELES, CAL., MUN. CODE ch. IV, art. 1, § 41.50.5 (added by Ordinance No. 172.487) (effective Apr. 12, 1999); *see also* L.A. Bar, Restaurant Owners Must Enforce Smoking Ban or Face Fines, *supra* note 75.

134. L.A. Bar, Restaurant Owners Must Enforce Smoking Ban or Face Fines, *supra* note 75.

135. *Id.*

136. Sheppard, *supra* note 115.

137. *Id.*

138. Orlov, *supra* note 109.

139. L.A. Bar, Restaurant Owners Must Enforce Smoking Ban or Face Fines, *supra* note 75.

140. Sheppard, *supra* note 115.

141. *See id.*; *see also* Hernandez, *supra* note 49.

142. Sheppard, *supra* note 115.

143. Patrick McGreevy, Toll-Free Number Would Help Enforce Smoking Ban, L.A. TIMES, Feb. 2, 1999, B3.

144. *Id.*

145. Hernandez, *supra* note 49.

The effectiveness of L.A.'s enforcement program will depend on several factors. The reporting mechanism seems promising: the prominent posting of a toll-free number provides a highly visible and relatively simple way for citizens to report violations. The city's use of full-time fire inspectors is commendable; however, the city should make sure the inspectors have flexible hours or work irregular shifts so they can inspect bars at night, when most violations occur. Also, because the announcement of an inspection could easily give a bar owner enough time to eliminate any evidence of violations, inspections should be unannounced. (Currently the L.A. fire inspectors do not show up at bars unannounced.)

The program's effectiveness will also depend on the city's commitment to the scheme, both politically and financially. The city council's actions indicate the city's desire to retreat from a "softer" approach and embrace more aggressive enforcement methods. L.A.'s two-person fire inspection team might be too small to handle all of the city's bars, but perhaps good publicity and visible results can garner the program increased funding.

One last advantage, and perhaps the greatest asset of the citizen reporting approach, is its ability to bring about higher compliance rates while at the same time appealing to the people for their input and assistance. Tactics predicated on such substantial public involvement can give citizens an empowering sense of ownership or partnership in the program. An effective enforcement program that the citizenry can be a part of and take pride in might have a greater chance of long-term survival and growth.

Litigation. Since California's smoking ban is enforced by local law enforcement agencies, cities and counties can sue bar owners for not complying with the ban. The publicity generated by a successful case could serve as a valu-

able deterrent to other potential or practicing violators of the law. However, litigating enforcement cases can be problematic. An unexpected or embarrassing outcome might generate public sympathy for the persecuted bar owner and turn public opinion against the enforcement agency. Another problem is that bar owners might mimic a strategy employed by a victorious defendant, impairing enforcement efforts in the long run. Recent cases of a city or county suing a bar owner for violating the ban seem to prove that litigation, tactfully undertaken, is a promising enforcement method for the future.

The city of San Francisco has taken the lead in trying to promote litigation as an effective enforcement method. The San Francisco city attorney's office has filed five civil actions against bar owners to try to bring them into compliance with the ban.¹⁴⁶ The city scored a major victory in February 2000, when a local court validated the city's use of its novel unfair business practices argument. The city argued that a bar owner had engaged in unfair business practices by allowing smoking in his bar, thereby obtaining a competitive edge over other bars where the ban was enforced. A San Francisco County Superior Court judge confirmed that the power of cities and counties to enforce the ban includes the authority to sue bar owners who allow patrons to smoke.¹⁴⁷ The court further held that the city could charge bar owners with claims of engaging in unfair business practices and creating a public nuisance by allowing customers to smoke inside the bar area.¹⁴⁸ This decision was the first of its kind in the U.S. and was watched carefully by local governments nationwide.¹⁴⁹

One of the San Francisco cases, however, illustrates the potential downside of the litigation approach. In July 1999, the city filed its first lawsuit against a bar owner for allegedly ignoring the ban.¹⁵⁰ During the first six months of the ban the city had warned bar owner Tim

146. City Attorney of San Francisco, *Smoke Free Workplaces*, at <http://www.ci.sf.ca.us/cityattorney/smokefree/smokefree.htm> (visited Feb. 28, 2000).

147. *CCSF v. Cassidy* (S.F. County, Cal. Super. Ct., decided Feb. 25, 2000).

148. *Id.*

149. City Attorney of San Francisco, *supra* note 146, at <http://www.ci.sf.ca.us/cityattorney/smokefree/smokefree.htm>.

150. *CCSF v. Delaney*, Case No. SCV-304858 (S.F. County, Cal. Super. Ct., filed July 13, 1999); see also Ken Garcia, *Smoke Got in Their Brains; City's Lawsuit Against Bar Owner Is Ludicrous*, S.F. CHRON., July 17, 1999, at A15.

Delaney repeatedly to comply, and Delaney had even been cited by health officials for allowing smoking in his bar.¹⁵¹ Had these been the only pertinent facts, a successful suit by the city could have provided a textbook precedent to deter future scofflaws. However, the facts and circumstances surrounding this case made it somewhat of a public relations nightmare.

Not long before this case was filed, San Francisco was battered by antismoking forces and the media for its lax enforcement of the ban. As Delaney happened to be a popular former professional football player, the notion that the city wanted to make an example out of him, especially after being soft on enforcing the ban for so long, generated a great deal of public sympathy. The sympathy created by this case seemed to taint what was otherwise a potent argument for the city, namely its unfair business practices claim. The media immediately ridiculed the city's claim that bar patrons "flocked" to the noncompliant bar because they knew they could smoke there, discrediting the city's argument in the court of public opinion and dampening the case's potential deterrent value.¹⁵²

The local media criticized the San Francisco city attorney's office for making a scapegoat out of Delaney while hundreds of other bars in the city continued to violate the ban nightly.¹⁵³ However, this case notwithstanding, litigation can serve as a powerful deterrent in cities with low compliance rates and bar owners that continue to violate the ban, provided the cases are brought in an evenhanded and sensible manner.

V. Final Observations and Conclusions

Perhaps the most effective enforcement programs maximize the advantages of the above methods — aggressive policing, citizen reporting, and litigation — while eliminating

or minimizing their downsides. Certainly, the models listed above do not comprise the entire spectrum of possible enforcement solutions. For example, the city of Sacramento has brought about greater compliance with the bar ban by teaming sheriff's deputies with city health department inspectors and forming an inter-agency enforcement program.¹⁵⁴ Compliance rates for Sacramento's stand-alone bars shot up from 11% to 62% over the last half of 1999.¹⁵⁵ Also, in southern California, the West Hollywood City Council approved an ordinance prohibiting the distribution of ashtrays and matchbooks in places where smoking is outlawed.¹⁵⁶ Under this creative law, sheriff's deputies and other enforcement officials inspect bars randomly, and issue citations where either of the smoking implements is found.¹⁵⁷ (The ordinance does allow bars to hand out promotional matchbooks if patrons ask for them when they leave the bar.)¹⁵⁸

The programs mentioned above are not intended as a menu of choices from which a municipality ought to choose. Rather, they are intended as jumping-off points for cities and counties to use in designing an enforcement program that fits in with the character and temperament of the community. A program involving aggressive police pursuit of ban violators can work well in a community with strong support for the ban and a police force dedicated to maintaining compliance. A citizen-reporting scheme might be a good fit for large cities with limited funds but relatively strong support for the ban. In areas that show some disapproval of the ban or that contain a high proportion of recalcitrant bar owners or patrons, a litigation-based enforcement program might provide the deterrent effect necessary to bring compliance rates up to par.

151. Garcia, *supra* note 150.

152. *Id.*

153. *Id.*

154. Bill McEwen, *Fresno to Get Tough on Smoke*, FRESNO BEE, Nov. 17, 1999, at B1.

155. *Id.*

156. W. Hollywood Bars Have 30 Days to Comply With Matches, Ashtray Ban, City News Service, Aug. 17, 1999.

157. *Id.*

158. *Id.*

Finally, municipalities must keep in mind that as with any major change in a law that affects human behavior, it will take time for people to adjust. Californians adjusted to the seat belt law, and they will get used to the bar ban. Cities and counties must understand, however, that the bar ban is the law. Although municipalities have a wide range of effective methods from which to choose, they cannot choose not to enforce the law.